No. 13226

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN PHILLIP WHITE,

Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 92)

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CHAUNCEY TRAMUTOLO, ESQ.,
United States Attorney,
Post Office Building, San Francisco, Calif.,
Attorney for Appellant.

M. S. HUBERMAN, ESQ.,
LEONARD J. BLOOM, ESQ.,
57 Post Street, San Francisco, California,
Attorneys for Appellee.

In the United States District Court, Northern District of California, Southern Division
No. 27740H

JOHN PHILLIP WHITE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR DAMAGES

Now comes plaintiff and for cause of action against defendant alleges as follows:

I.

This action is brought pursuant to the Federal Tort Claims Act.

II.

At all times herein mentioned, plaintiff was and now is a resident of the City and County of San Francisco, State of California, which said City and County is located within the Northern District of California, Southern Division.

III.

At all times herein mentioned, the United States of America owned and operated an Army base known as Camp Beale, located at Marysville, California.

IV.

At all times herein mentioned, plaintiff was and now is the employee of Mars Metal Company, a co-partnership, with its place of business located at 1200 Minnesota Street, San Francisco, California.

V.

On or about November 18, 1946, said Mars Metal Company entered into a written contract with the United States of America for the collection of metal scrap at Camp Beale, California.

VI.

On November 22, 1946, pursuant to said contract, plaintiff was supervising on behalf of said Mars Metal Company the collection of scrap metal from the strafing range adjacent to firing ranges 9 and 10B at Camp Beale, to the knowledge of defendant United States of America, its agents, servants, and employees. At said time and place, the United States of America through its agents, servants and employees, negligently and carelessly permitted unexploded shells to remain on said strafing range and negligently and carelessly failed and neglected to warn plaintiff of the presence of the same.

VII.

As a result of said negligence and carelessness, plaintiff discarded what appeared to be a non-explosive shell, and the same thereupon exploded in his immediate presence, fragments thereof penetrating both of the plaintiff's feet and legs, and causing the following injuries:

(a) Severe lacerations over both feet and legs.

(b) Injury to the nerves, muscles and tendons in both feet and legs.

(c) Fracture of bones in both feet.

(d) Limitation of motion in left ankle.

(e) Callouses on both feet.

(f) Severe nervous shock, pain and suffering.

VIII.

For sometime prior to said accident, plaintiff was employed as a salesman, and his earnings from said employment were approximately Two Hundred Fifty Dollars ($250.00) per month. As a result of said negligence and carelessness and said injuries, plaintiff was unable to engage in said employment for a period of seventeen (17) weeks, to his damage in the sum of One thousand Dollars ($1000.00).

IX.

As a result of said negligence and said carelessness and said injuries, plaintiff was compelled to engage the services of physicians and surgeons, and will continue to require the services of physicians and surgeons. The cost of said services of physicians and surgeons to date hereof is the sum of Five Hundred Dollars ($500.00), and said sum is the reasonable cost and value thereof. Plaintiff does not know the cost of services to be rendered by said physicians and surgeons, and ask leave to insert said cost when the same shall have been ascertained.

X.

As a result of said negligence and said carelessness and said injuries, plaintiff has been compelled to obtain X-rays, drugs, and hospitalization. The costs of said X-rays, drugs, and hospitalization are Thirty-five Dollars ($35.00), Fifty Dollars ($50.00), and Three Hundred Dollars ($300.00) respectively, and said sums were and are the reasonable cost and value thereof. Plaintiff is informed and be-

lieves and therefore alleges that he will be required to obtain further X-rays, drugs, hospitalization, the exact cost of which is unknown to him, and therefore prays leave to insert the exact cost of such further X-rays, drugs, and hospitalization when the same shall have been ascertained.

XI.

As a result of said explosion and said accident, the topcoat, shoes, and pants that plaintiff was then and there wearing were completely destroyed. The reasonable value of said topcoat, shoes and pants was Sixty-five Dollars ($65.00), Fifteen Dollars ($15.00), and Eight Dollars ($8.00) respectively.

XII.

By reason of the foregoing facts, plaintiff has been damaged in the sum of Thirty-six Thousand Nine Hundred Seventy-Three Dollars ($36,973.00), no part of which has been paid.

Wherefor plaintiff places judgment against the defendant in the sum of Thirty-six Thousand Nine Hundred Seventy-Three Dollars ($36,973.00), together with interest and costs incurred herein, and such other and further relief as this Court may deem just and proper.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 12, 1947.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now defendant United States of America, and answering plaintiff's complaint on file herein, denies and alleges as follows:

I.

Denies the allegations of Paragraphs VII and XII and the portions of Paragraph VI beginning with the words "At said time," line 17, page 2, to and including the words "the same," line 21, page 2, and the portion of Paragraph VIII beginning with the word "As," line 8, page 3, to and including the figures "($1000.00)," line 12, page 3, and the portion of Paragraph IX beginning with the words "As a result," line 14, page 3, to and including the word "surgeons," line 17, page 3; and the portion of Paragraph X beginning with the words "As a result," line 24, page 3, to and including the word "hospitalization," line 26, page 3; and the portion of Paragraph XI, beginning with the words "As a result," line 6, page 4, to and including the word "destroyed," line 8, page 4; and denies that plaintiff has been damaged in the sum of $36,973.00 or any part thereof, or in any sum or amount or at all.

II.

Said answering defendant has no information upon the subject sufficient to enable it to form a belief as to the truth of the allegations contained in Paragraph IV, the portion of Paragraph VIII,

beginning with the words "For sometime," line 6, page 3, to and including the word "month," line 8, page 3; the portion of Paragraph IX beginning with the words "The cost," line 17, page 3, to and including the word "ascertained," line 22, page 3; the portion of Paragraph X beginning with the words "The costs," line 26, page 3, to and including the word "ascertained," line 4, page 4, and the portion of Paragraph XI, beginning with the words "The reasonable," line 8, page 4, to and including the word "respectively," line 10, page 4, and, therefore, and basing its denial upon that ground, said defendant denies each and all of said allegations.

III.

Further answering said complaint and as a separate defense thereto, said defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by an unavoidable accident.

IV.

Further answering said complaint and as a separate defense thereto, said defendant alleges that the conditions complained of in said complaint were open, patent and obvious conditions and were known to the plaintiff herein, and that said plaintiff assumed the risk of injury from said conditions.

V.

Further answering said complaint and as a separate defense of contributory negligence thereto, said defendant alleges that the accident and injuries

and damages complained of, if any, were due to and caused by plaintiff's own *careless* and negligence proximately contributing thereto and alleges that said plaintiff, upon the occasion referred to in the complaint, failed to use his eyes and other faculties, failed to use ordinary care and caution to protect himself from injury and carelessly and negligently picked up, handled and dropped the explosive object referred to in the complaint and otherwise carelessly and negligently conducted himself upon said occasion thereby proximately contributing to the cause of the accident and injuries and damages complained of, if any there were.

Wherefore, said defendant prays that plaintiff take nothing by his complaint herein and that said defendant be hence dismissed with its costs.

FRANK J. HENNESSY,
United States Attorney,

By /s/ DANIEL C. DEASY,

/s/ DANIEL C. DEASY,
Assistant United States Attorney, Attorneys for Defendant, United States of America.

[Endorsed]: Filed July 14, 1948.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY PLAINTIFF

To the United States of America, the above-named defendant, and to Frank J. Hennessy, United States Attorney, and Daniel C. Deasy, Assistant United States Attorney:

You, or any officer or agent of the United States Government who shall furnish such information as is available, are hereby required to answer separately and fully in writing the following interrogatories:

(1) What are the full names, Army ranks and titles of the officers at Camp Beale, Marysville, California in charge of the decontamination of the strafing range adjacent to Firing Ranges 9 and 10B at said Camp Beale on or before November 22, 1946?

(2) Were there any United States Army regulations governing the decontamination of firing ranges of Army installations prior to the admission of civilians to said ranges for the purpose of collecting scrap metal therefrom, in existence on or before November 22, 1946?

(3) If your answer to question (2) is in the affirmative, then state what said regulations were and where the same may be found.

(4) Were there any Army regulations issued by the Adjutant General's Office or other competent

Army authority on or before November 22, 1946, regulating or governing the decontamination of firing ranges at Camp Beale, Marysville, California preparatory to the admission of civilians thereon for the purpose of collecting scrap metal pursuant to contracts with the United States Army?

(5) If your answer to question (4) is in the affirmative then state what such regulations were in detail and where the same may be found.

(6) If your answers to questions (2) and (4), or either of them, are in the affirmative, then state whether such regulations were carried out at Camp Beale on or before November 22, 1946, in respect to the strafing range adjacent to Firing Ranges 9 and 10B.

(7) State the dates when and the manner in which the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale were decontaminated during the six month period prior to November 22, 1946.

(8) Describe in detail the dates when and the manner in which the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale, Marysville, California, was decontaminated during the six month period immediately prior to November 22, 1946.

(9) During what period of time immediately prior to November 22, 1946, was the strafing range adjacent to Firing Ranges 9 and 10B at Camp

Beale, Marysville, California used by the United States Army for target practice purposes?

(10) During what period of time immediately prior to November 22, 1946, were Firing Ranges 9 and 10B, and the adjacent firing or practice ranges, used for target practice?

(11) Was any warning of danger given by any Army officer or other Army personnel to the plaintiff prior to his entry on said strafing range at Camp Beale, on November 22, 1946?

(12) If your answer to question (11) is in the affirmative, then give the name or names of the officers or Army personnel giving such instructions and the precise nature of the instructions or warning, if any, given.

Dated February 23, 1949.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

[Endorsed]: Filed February 23, 1949.

[Title of District Court and Cause.]

STIPULATION RESPECTING FILING OF FIRST AMENDED COMPLAINT

It is hereby stipulated by and between counsel for defendant and counsel for plaintiff that plaintiff may file herein his First Amended Complaint for

Damages, which said Complaint is attached hereto, and that each and every allegation contained therein which does not appear in plaintiff's original complaint shall be deemed denied by defendant.

Dated September 29, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ RUDOLPH J. SCHOLZ,
Assistant United States Attorney, Attorneys for Defendant, United States of America.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

[Endorsed]: Filed October 2, 1950.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT FOR DAMAGES

Now Comes plaintiff and for cause of action against defendant alleges as follows:

I.

This action is brought pursuant to the Federal Tort Claims Act.

II.

At all times herein mentioned, up to the 15th day of July, 1950, plaintiff was a resident of the

City and County of San Francisco, State of California, which said City and County is located within the Northern District of California, Southern Division. Since said date plaintiff was and now is a resident of Sausalito, County of Marin, State of California, which said city of Sausalito is located within the Northern District of California, Southern Division.

III.

At all times herein mentioned, the United States of America owned and operated an Army base known as Camp Beale located at Marysville, California.

IV.

At all times herein mentioned, until April, 1949, plaintiff was the employee of Mars Metal Company, a co-partnership, with its place of business at 1200 Minnesota Street, San Francisco, California. Plaintiff left the employ of said Mars Metal Company on said date.

V.

On or about November 18, 1946, said Mars Metal Company entered into a written contract with the United States of America for the collection of metal scrap at Camp Beale, California.

VI.

On November 22, 1946, pursuant to said contract, plaintiff was supervising on behalf of said Mars Metal Company the collection of scrap metal from the strafing ranges adjacent to Firing Ranges 9 and

10B at Camp Beale, to the knowledge of defendant United States of America, its agents, servants, and employees. At said time and place, the United States of America through its agents, servants and employees, negligently and carelessly permitted unexploded shells to remain on said strafing range and negligently and carelessly failed and neglected to warn plaintiff of the presence of the same.

VII.

As a result of said negligence and carelessness, plaintiff discarded what appeared to be a non-explosive shell, and the same thereupon exploded in his immediate presence, fragments thereof penetrating both of plaintiff's feet and legs, and causing the following injuries:

(a) Severe lacerations over both feet and legs.

(b) Injury to the nerves, muscles and tendons in both feet and legs.

(c) Fracture of bones in both feet.

(d) Limitation of motion in left ankle.

(e) Callouses on both feet.

(f) Severe nervous shock, pain and suffering.

VIII.

For some time prior to said accident, plaintiff was employed as a metal salesman, and his earnings from said employment were approximately Two Hundred and Fifty Dollars ($250.00) per month. As a result of said negligence and carelessness and said injuries, plaintiff was unable to engage in his said employment for a period of seventeen (17) weeks to his damage in the sum of One Thousand

Dollars ($1,000.00). Thereafter plaintiff was unable to engage in said employment for a period of fifteen (15) weeks to his further damage in the sum of approximately One Thousand Four Hundred Dollars ($1,400.00). As a result of said negligence and carelessness and said injuries, plaintiff was able to engage in said employment in a limited capacity only for a period of twenty-three (23) months, to this further damage in the sum of approximately Two Thousand Three Hundred Dollars ($2,300.00).

IX.

As a result of said negligence and carelessness, and said injuries, plaintiff was compelled to engage the services of physicians and surgeons. The cost of said services of said physicians and surgeons was and is the sum of Eight Hundred Eighty Dollars and Sixty-seven Cents ($880.67), and said sum was and is the reasonable cost and value thereof. Plaintiff is informed and believes and therefore alleges that he will continue to require the services of physicians and surgeons in the treatment of said injuries in the future, and plaintiff is informed and believes and therefore alleges that the cost of said future services will be in excess of One Thousand Dollars ($1,000.00), which said sum was and is the reasonable value and cost thereof.

X.

As a result of said negligence and said carelessness and said injuries, plaintiff has been compelled

to obtain X-rays, drugs and hospitalization. The cost of said X-rays, drugs and hospitalization is and was the sum of Forty-five Dollars ($45.00), Fifty Dollars ($50.00), and Two Thousand One Hundred Six Dollars and Seventy-two Cents ($2,-106.72) respectively, and said sums were and are the reasonable value thereof. Plaintiff is informed and believes and therefore alleges that said injuries will require further hospitalization, and that the cost thereof will exceed the sum of One Thousand Dollars ($1,000.00).

XI.

As a result of said explosion and said accident, the topcoat, shoes, and pants that plaintiff was then and there wearing were completely destroyed. The reasonable value of said topcoat, shoes and pants was Sixty-five Dollars ($65.00), Fifteen Dollars ($15.00) and Eight Dollars ($8.00) respectively.

XII.

As a result of said carelessness, negligence and said injuries, plaintiff required the use of canes and crutches. The cost of said canes and crutches was and is the sum of Thirty Dollars ($30.00), and said sum was and is the cost thereof.

XIII.

As a result of said carelessness, negligence and said injuries, plaintiff required the services of an ambulance from Camp to Mary's Help Hospital, San Francisco, California. The cost of said ambulance was and is the sum of One Hundred Fifteen

Dollars ($115.00), and said sum was and is the reasonable cost and value thereof. And thereafter on December 25, 1946, as a result of said negligence, carelessness and said injuries, plaintiff again required the services of an ambulance, the cost of which was and is the sum of Thirteen Dollars ($13.00), and said sum was and is the cost and value thereof.

XVI.

By reason of the foregoing facts plaintiff has been damaged in the sum of Sixty Thousand Twenty-eight Dollars and Thirty-nine Cents ($60,028.39), no part of which has been paid.

Wherefore, plaintiff prays judgment against defendant in the sum of Sixty Thousand Twenty-eight Dollars and Thirty-nine Cents ($60,028.39), together with interest and costs incurred herein, and such other and further relief as this court may deem just and proper.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed October 2, 1950.

[Title of District Court and Cause.]

MOTION FOR PRODUCTION OF DOCUMENTS

Plaintiff, John Phillip White moves the court for an order requiring defendant United States of America to produce and to permit plaintiff to inspect and to copy each of the following documents:

(1) All of the X-rays and medical records of or concerning the physical condition and treatment of plaintiff John Phillip White for the period from November 22, 1946, to and including November 27, 1946, which were made and filed by the United States Army at Camp Beale, California.

(2) The decontamination records of the United States Army for firing ranges 9 and 10B and the strafing range adjacent thereto, at Camp Beale, California for the period of January 1, 1944, to and including November 22, 1946.

(3) The range firing records for firing ranges 9 and 10B, and the adjacent firing and strafing ranges, at Camp Beale, California for the period of January 1, 1944, to and including November 22, 1946.

(4) War Department Circular 195 dated June 29, 1945, respecting decontamination procedure.

(5) The memorandum issued by the Post Operation Officer at Camp Beale, California in compliance with Section I of said War Department Circular 195.

(6) The memorandum issued by the Assistant Post Range Officer, Camp Beale, California, to Major Hermansen, Post Training Office, dated October 17, 1944, the same being a report of de-dudding operations accomplished on or about October 14, 1944.

(7) Statement of Technical Sergeant Frank C. Hodges, Serial No. 39531493, Headquarters Department, Post Operating Company 6007, Army Service Unit, Camp Beale, California dated January 29, 1947.

(8) Newspaper releases issued by Captain Robert Sumner Jones, as Public Relations Officer, to the newspapers near Camp Beale, California, issued a short time prior to November 22, 1946, on the subject of the existence of duds on the firing ranges at Camp Beale, California.

(9) The memorandum from said Captain Robert Sumner Jones to the President of the Sheep Herder's Association, Marysville, California, issued a short time prior to November 22, 1946, which said memorandum contained a warning of the possibility of the presence of high explosive ammunition on the firing ranges at Camp Beale, California.

Defendant United States of America has the possession, custody or control of each of the foregoing documents, and each of said documents constitutes and contains evidence relative and material to a matter involved in the above-entitled action, as is more particularly set forth in the Affidavit of

Leonard J. Bloom, attached hereto marked Exhibit "A" and made a part hereof.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

Notice of Motion

To: Frank J. Hennessey, United States Attorney; Rudolph J. Scholz, Assistant United States Attorney; and to defendant United States of America.

Please take notice that the undersigned will bring the above motion for production of documents, papers and records under Rule 34 on for hearing before this Court at Room 338 United States District Court, Post Office Building, San Francisco, California on the 9th day of October, 1950, at 10:00 o'clock a.m. of that day or as soon thereafter as counsel may be heard.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed October 3, 1950.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR ORDER TO PRODUCE DOCUMENTS

State of California,
City and County of San Francisco—ss.

Leonard J. Bloom, being first duly sworn, deposes and says:

I am one of the attorneys for John Phillip White, the plaintiff in the above-entitled action, and the facts herein stated are within my knowledge.

(1) The above-entitled action is an action brought pursuant to the Federal Tort Claims Act to recover damages in the sum of Sixty Thousand Twenty-eight Dollars and Thirty-nine Cents ($60,-028.39) for injuries sustained by plaintiff as a result of the explosion of a shell on a strafing range on November 22, 1946, at Camp Beale, California.

(2) The accident occurred when plaintiff was supervising on behalf of the Mars Metal Company of San Francisco the collection of scrap metal from the strafing ranges adjacent to firing ranges 9 and 10B at said Camp Beale pursuant to a certain contract by and between said Mars Metal Company and the United States of America for the collection of scrap metal at Camp Beale, California. Reference is hereby made to the First Amended Complaint on file herein and by such reference said complaint is incorporated herein as though the same were herein set forth in full. As more particularly appears from said First Amended Complaint, said accident

and the injuries sustained by plaintiff were caused by the negligence of the United States of America, and its agents, servants and employees, in permitting unexploded shells to remain on the strafing range in question, and in failing and neglecting to warn plaintiff of the presence of the same.

(3) This action was commenced by the filing of a complaint and the service of summons on or about the 12th day of November, 1947. Defendant United States of America duly appeared and issue was joined by the service on the 19th of January, 1948 of defendant's answer. Thereafter, on or about the .. day of September, 1950, plaintiff filed his First Amended Complaint pursuant to stipulation, which said stipulation provides that all of the allegations contained therein and not appearing in plaintiff's original complaint should be deemed denied by defendant United States of America.

(4) There will be presented to the court, at the hearing of this motion, all of the pleadings in this action. Such pleadings are hereby made a part of this affidavit with the same force and effect as if the same were herein set forth in full.

(5) Plaintiff has been heretofore advised by the United States of America of the existence of all of the papers, records and documents set forth in said motion. All of said papers, records and documents contain information relative to the issues involved in the above-entitled action for the following reasons:

(a) Said X-rays and medical records: these records were made and kept by the medical department of the United States Army at Camp Beale, California, where plaintiff was treated for his injuries from November 22, 1946, to and including November 27, 1946. Said X-rays and records show the extent of the original injuries sustained by plaintiff as a result of the accident and the treatment provided for the same.

(b) Said decontamination records: these records were made by the United States Army at Camp Beale, California, and reveal the nature and extent of the negligence of the defendant in failing to properly decontaminate the area in which the accident occurred.

(c) Said range firing records: these records were likewise kept in the regular course of the operation of the United States Army at Camp Beale, California, for the period immediately prior to the accident in question and show the extent and nature of the firing of explosive material on or near the strafing range on which the accident occurred, and further show the likelihood of such explosive material being present at the time of the accident, the negligence of the defendant in failing to detect the same, and the knowledge of the defendant of such explosives.

(d) Said War Department Circular 195 dated June 29, 1945: the existence of this circular in the possession of the defendant United States of America is shown by the reference thereto on pages 2 & 3 of the response of Captain Robert Sumner Jones to the Interrogatories propounded by plaintiff in

said action; a copy of said response is attached hereto marked Exhibit "B" and made a part hereof. Said circular contains information respecting the procedure used by the United States Army to decontaminate firing and strafing ranges. Plaintiff proposes to show in the trial of this action that said instructions were not adequate and that in any event defendant failed and neglected to comply with the same.

(e) Said memorandum issued by the Post Operation Officer complying with Section I of said Circular 195: the existence of this memorandum in the possession of the defendant is shown by the reference thereto on Page 2 of the attached Exhibit "B." Said memorandum contains information respecting the purported compliance of the responsible army officers at Camp Beale, California, prior to the accident in question, with the decontamination procedure specified in said War Department Circular 195, and affiant is informed and believes and therefore alleges that said memorandum will show that said officers failed and neglected to comply with the requirements of said Circular 195.

(f) Said memorandum issued by the Assistant Post Range Officer to Major Hermansen, Post Training Office, dated October 17, 1944: the existence of the memorandum in the possession of the defendant United States of America is likewise shown by reference thereto on Page 3 of the attached Exhibit "B." This memorandum contains information respecting the attempt of the responsible officer to accomplish de-dudding operations on

the range on which the accident occurred on said date. This report is of particular importance since it is contended by said Captain Robert Sumner Jones that no high explosive ammunition was fired on the range in question after the said date and prior to the date of the accident in question, as more particularly appears on page 3 of said Exhibit "B."

(g) Said statement of Technical Sergeant Frank C. Hodges: the existence of this statement in the possession of the United States Attorney's office is shown by the reference thereto on page 4 of said Exhibit "B" where the same is referred to as "Exhibit L." Said Frank C. Hodges was Range Sergeant at Camp Beale at the time of the accident and conducted plaintiff over the area where the accident occurred immediately prior thereto. Said Frank C. Hodges was and is familiar with the strafing and firing practices at Camp Beale for a period of time immediately prior to the accident, as well as with the decontamination procedure used at Camp Beale at said time. Therefore his statement should contain information related to the danger of the area in question and the steps, if any, taken by the United States Army to render the areas in question safe for the purpose used.

(h) Said newspaper releases issued by Captain Robert Sumner Jones, as Public Relations Officer: the existence of said releases in possession of the United States government is shown by reference thereto on page 4 of said Exhibit "B." Affiant is informed and believes and therefore alleges that said releases will show knowledge upon the part of

the officers in control of the area in which the accident occurred of the dangers existing at the time of the accident.

(i) Said memorandum from Captain Robert Sumner Jones to the President of the Sheep Herder's Association: the existence of said memorandum is shown by the reference thereto on page 4 of said Exhibit "B" and said memorandum likewise contains information showing knowledge upon the part of the responsible officers of the danger existing in the area where the accident occurred.

(6) None of the said documents or records are in the possession or under the control of plaintiff or his attorneys nor has he any copies thereof or extracts therefrom and he is wholly ignorant of their precise contents. Each and every one of the aforesaid documents, papers and records are in the possession or under the control of the defendant, and plaintiff and his attorneys know of no way to obtain a knowledge thereof except by ordering defendant to make discovery thereof.

(7) Plaintiff has a good and meritorious cause of action herein and all of said papers, records and documents are material and necessary to the plaintiff to enable him to prepare for trial, and he cannot proceed to trial without them.

(8) This application is made in good faith for the purposes stated and none other, and plaintiff and his attorneys intend to use each and everyone of said documents, papers and records on the trial of said action.

Wherefore affiant respectfully applies to this court for an order requesting defendant United States of America to produce and discover, or to give an inspection and copy of, or permission to take a copy of, each and everyone of the aforesaid documents and records, and to deposit each and everyone of said documents and records in the office of the clerk of this court or elsewhere, as the court shall direct, where they shall remain subject to examination of plaintiff's attorneys during ordinary business hours, for such a period as the court shall direct; and to permit plaintiff and his attorneys to take photographic copies of any such records, papers and documents as he shall require.

/s/ LEONARD J. BLOOM,

Subscribed and sworn to before me this 3rd day of October, 1950.

[Seal] /s/ JEROME SOCK,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires February 7, 1952.

EXHIBIT "B"

(Copy)

State of Texas,
County of Harris—ss.

Statement of Robert Sumner Jones in response to the interrogatories propounded by plaintiff in the case of John Phillip White vs. United States of America in the United States District Court, Northern District.

The witness being duly sworn answered the propounded interrogatories as follows:

Interrogatory one: What are the full names, Army ranks and titles of the officers at Camp Beale, Marysville, California in charge of the decontamination of the strafing range adjacent to Firing Ranges 9 and 10B at said Camp Beale on or before November 22, 1946:

Answer: Elmer P. Chipman, 2nd Lt., AUS, Assistant Range Officer. On or about October, 1944, length of tour unknown. Names of intermediate range officers from that date until July, 1946, unknown to me. I was assigned as Post Range Officer on or about July, 1946, and was in that capacity at the time of the alleged accident, 22 November, 1946.

Second Interrogatory: Were there any United States Army regulations governing the decontamination of firing ranges of Army installations prior to the admission of civilians to said ranges for the

purpose of collecting scrap metal therefrom, in existence on or before November 22, 1946?

Answer: Not to my knowledge.

Third Interrogatory: If your answer to question (2) is in the affirmative, then state what said regulations were and where the same may be found.

Answer: No remark.

Fourth Interrogatory: Were there any Army regulations issued by the Adjutant General's Office or other competent Army authority on or before November 22, 1946, regulating or governing the decontamination of firing ranges at Camp Beale, Marysville, California preparatory to the admission of civilians thereon for the purpose of collecting scrap metal pursuant to contracts with the United States Army?

Answer: Not to my knowledge.

Fifth Interrogatory: If your answer to question (4) is in the affirmative then state what such regulations were in detail and where the same may be found.

Answer: No remark.

Sixth Interrogatory: If your answers to questions (2) and (4), or either of them, are in the affimative, then state whether such regulations were carried out at Camp Beale on or before November 22, 1946, in respect to the strafing range adjacent to Firing Ranges 9 and 10B.

Answer: No remark.

Seventh Interrogatory: State the dates when

and the manner in which the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale were decontaminated during the six month period prior to November 22, 1946.

Answer: There were no large scale decontamination operations of the impact areas of the said ranges during the 6 month period prior to 22 November, 1946, however, during this period of time normal demolition of duds discovered by persons having access to these areas was continuously accomplished in accordance with standard operating procedures as specified in a memorandum issued by the Post Operations Officer in compliance with Section I, WD circular 195, 29 June, 1945. Your attention is further invited to memorandum from Assistant Post Range Officer, Camp Beale, California, subject: Dud Clean-up of Range Areas, to Major Hermansen, Post Training Office, dated 17 October, '44, which is a report of de-dudding operations accomplished on or about 14 October, 1944. There was no firing of HE ammunition on those ranges from the time that these de-dudding operations were accomplished to the time of the alleged accident.

Eighth Interrogatory: State the dates when and the manner in which the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale were decontaminated during the six month period prior to November 22, 1946.

Answer: Your attention is invited to the answer of interrogatory No. 7.

Ninth Interrogatory: During what period of time immediately prior to November 22, 1946, was the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale, Marysville, California used by the United States Army for target practice purposes?

Answer: No HE type ammunition was fired on Ranges 9 and 10B during the period of time immediately prior to 22 November, 1946.

Tenth Interrogatory: During what period of time immediately prior to November 22, 1946, were Firing Ranges 9 and 10B, and the adjacent firing or practice ranges, used for target practice?

Answer: No HE type ammunition was fired during the period of time immediately prior to 22 November, 1946, on firing ranges 9 and 10B or the adjacent or practice ranges.

Eleventh Interrogatory: Was any warning of danger given by any Army officer or other Army personnel to the plaintiff prior to his entry on said strafing range at Camp Beale, on November 22, 1946?

Answer: Yes.

Twelfth Interrogatory: If your answer to question (11) is in the affirmative, then give the name or names of the officers or Army personnel giving such instructions and the precise nature of the instructions or warning, if any, given.

Answer: I, Robert Sumner Jones, at the time Captain, AC Attached, AUS, as Post Range Officer instructed Mr. John Phillip White, the plaintiff,

that in all probability duds existed in the Artillery Impace areas and areas adjacent thereto. Therefore, I instructed him that due caution should be practiced during his operations in these areas. I further instructed him in the event he discovered a dud, that he should not approach it beyond a safe distance to insure that the dud would not be disturbed; that he should mark the general locality, and immediately notify either myself or the provost marshall of its existence and location. Mr. White assured me that having been a Seabee on Saipan associated with demolition activities, he was familiar with safety precautions to be exercised in possible contaminated areas.

My range sergeant, T/Sgt. Frank C. Hodges, at that time informed me that he also gave a similar warning to Mr. White prior to Mr. White's admission to the range area. Your attention is invited to statement by T/Sgt. Frank C. Hodges, 39531493, Headquarters Detachment, Post Operating Company, 6007, Army Service Unit, Camp Beale, California, dated 29 January, 1947, listed as Exhibit L in the attached file.

I might add that a short time prior to the alleged accident, I as Public Relations Officer for the installation, arranged to have the local newspaper of greatest circulation carry an article advising the public of the possibility of existence of duds on the ranges, and advised the public of caution that should be practiced while in the area and procedure to be used in marking and reporting any duds that might be discovered. Furthermore, a short time prior to

the alleged accident, in the capacity of Post Operations Officer, I prepared a memorandum to the President of the Sheep Herder's Association for that locality with a request that he furnish a copy of same to all sheep herders who might have occasion to be in those areas. This memorandum contained a warning of a possibility of the presence of HE ammunition in the area and instructions governing their conduct in the proximity of these duds, also instructions regarding the marking of the locality and the reporting of it to proper authority. Elaborate measures were taken to warn and advise all persons of the possibility of the existence of unexploded HE projectiles on the military reservation of Camp Beale, California.

/s/ ROBERT S. JONES,
Captain, USAF.

State of Texas,
County of Harris.

Subscribed and sworn to before me this 14th day of November, 1949.

[Seal] /s/ JAMES S. HALL,
Notary Public in and for
Harris County, Texas.

My commisison expires June 1, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed October 3, 1950.

[Title of District Court and Cause.]

ORDER FOR PRODUCTION AND INSPECTION OF DOCUMENTS

The motion of plaintiff for the production and inspection of the hereinafter described papers, records and documents came on regularly before the above-entitled court, the Honorable Michael J. Roche presiding, on October 9, 1950, plaintiff appearing by M. S. Huberman and Leonard J. Bloom, his attorneys, and defendant appearing by Rudolph Scholz, Assistant United States Attorney. The court having read the Affidavit of Leonard J. Bloom in support of said motion, and being fully advised in the premises;

It is hereby Ordered, Adjudged and Decreed as follows:

(1) That the said motion be and the same is hereby granted in all respects;

(2) That service of a copy of this order with notice of entry thereof be made forthwith upon the United States Attorney at San Francisco, California;

(3) That defendant, United States of America, within five (5) days of the trial of the above-entitled action, which is now set for trial on October 25, 1950, deposit and leave with the clerk of this court the following books, records and documents:

(a) All of the X-rays and medical records of or concerning the physical condition and treatment of

plaintiff John Phillip White for the period from November 22, 1946, to and including November 27, 1946, which were made and filed by the United States Army at Camp Beale, California.

(b) The decontamination records of the United States Army for firing ranges 9 and 10B and the strafing range adjacent thereto, at Camp Beale, California, for the period of January 1, 1944, to and including November 22, 1946.

(c) The range firing records for firing ranges 9 and 10B and the adjacent firing and strafing ranges, at Camp Beale, California, for the period of January 1, 1944, to and including November 22, 1946.

(d) War Department Circular 195 dated June 29, 1945, respecting decontamination procedure.

(e) The memorandum issued by the Post Operation Officer at Camp Beale, California, in compliance with Section I of said War Department Circular 195.

(f) The memorandum issued by the Assistant Post Range Officer, Camp Beale, California, to Major Hermansen, Post Training Office, dated October 17, 1944, the same being a report of de-dudding operations accomplished on or about October 14, 1944.

(g) Statement of Technical Sergeant Frank C. Hodges, Serial No. 39531493, Headquarters Department, Post Operating Company 6007, Army Service Unit, Camp Beale, California, dated January 29, 1947.

(h) Newspaper releases issued by Captain Rob-

ert Sumner Jones, as Public Relations Officer, to the newspapers near Camp Beale, California, issued a short time prior to November 22, 1946, on the subject of the existence of duds on the firing ranges at Camp Beale, California.

(i) The memorandum from said Captain Robert Sumner Jones to the President of the Sheep Herder's Association, Marysville, California, issued a short time prior to November 22, 1946, which said memorandum contained a warning of the possibility of the presence of high explosive ammunition on the firing ranges at Camp Beale, California.

(4) That plaintiff John Phillip White, and his attorneys, be permitted to inspect all of the aforesaid records, papers and documents and make such copies and abstracts thereof as they may deem advisable.

Dated October 11th, 1950.

/s/ MICHAEL J. ROCHE,
Chief Judge,
U. S. District Court.

[Endorsed]: Filed October 11, 1950.

[Title of District Court and Cause.]

CLAIM OF LIEN

To the Honorable, the above-entitled court, and to defendant United States of America and the United States Attorney:

The undersigned, Industrial Indemnity Company,

a corporation, hereby requests the above-entitled court to determine and allow as a lien the sum of Four Thousand Four Hundred Thirty-eight and 54/100 Dollars ($4,438.54) against any judgment which may be made and entered in favor of plaintiff John Phillip White in the above-entitled action.

At the time of the accident and injuries set forth in the First Amended Complaint on file herein, plaintiff John Phillip White was acting within the course and scope of his employment by Mars Metal Company, 1200 Minnesota Street, San Francisco, California. At said time plaintiff was covered by a Workman's Compensation Insurance policy issued by the undersigned to said Mars Metal Company, and said Four Thousand Four Hundred Thirty-eight and 54/100 Dollars ($4,438.54) was paid for or on behalf of plaintiff by the undersigned pursuant to said policy.

This request and claim of lien is for:

(1) The reasonable expenses incurred by or on behalf of said plaintiff for medical treatment and hospitalization to cure and relieve him from the effects of the injuries set forth in the First Amended Complaint herein, in the sum of Three Thousand One Hundred Sixty-seven and 09/100 Dollars ($3,167.09).

(2) Reimbursement for temporary disability payments heretofore paid plaintiff John Phillip White by the undersigned in the sum of One Thou-

sand Two Hundred Seventy-one and 54/100 Dollars ($1,271.45).

INDUSTRIAL INDEMNITY COMPANY,

By /s/ J. V. CHAMBERS,
Lien Claimant.

The undersigned, John Phillip White, plaintiff herein, hereby consents to the requested allowance of the foregoing claim of lien.

/s/ JOHN PHILLIP WHITE,
Plaintiff.

State of California,
City and County of San Francisco—ss.

J. V. Chambers, being first duly sworn, deposes and says:

I am an officer, to wit, treasurer thereof, of the Industrial Indemnity Company, a corporation, lien claimant, and I make this verification for and on behalf of said lien claimant. The foregoing claim of lien is true and correct, and the sums set forth therein have been paid by Industrial Indemnity Company in the manner and for the reasons set forth in said claim of lien.

/s/ J. V. CHAMBERS.

Subscribed and sworn to before me this 6th day of November, 1950.

[Seal] /s/ ALICE C. MORSE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed November 6, 1950.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER

Plaintiff, on behalf of the Mars Metal Company of San Francisco, entered into a contract with the United States for the recovery of scrap metal from the strafing range at Camp Beale near Marysville, California.

While collecting metal, with the assistance of certain off-duty troop personnel employed for the purpose (with the consent of superior officers), plaintiff received serious injuries from the explosion of a dud.[1]

The presence of unexploded shells on the strafing range was a strong possibility. Testimony at the trial, as elicited from the Post Range Officer, indicates that de-dudding operations were considered and recommended but were not undertaken because of the likely expense. Despite the knowledge on the part of both the Range Officer and the Sergeant in charge that danger lurked on the range, neither of them disclosed to plaintiff the degree of caution required in order to accomplish scrap collecting with safety.

When plaintiff entered the strafing range as a business invitee, intent upon collecting as much scrap as possible he was not forewarned of the dangers which he might encounter in accomplishing his work. The record indicates that he was told

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[1]Webster's New International Dictionary, Second Edition: "Dud: A bomb that fails to explode because of a defective fuse."

only that there was a marked dud and that he should beware of it. When he was present on the range with his then financee, the Sergeant accompanying him indicated that the range was safe. Shortly thereafter, plaintiff received his injuries when he dropped a dud one of his employees handed or tossed to him.

Under the Federal Tort Claims Act the United States is subject to the same liability as that of a private individual. 28 USCA 1346(b); United States v. Fotopulos, 180 F. 2d 631. Military personnel in the instant case were negligent within the scope of their employment in failing to maintain the strafing range in a safe condition for one acting as a business invitee. Thus, the Government is liable for damages. Beasley v. United States, 81 F. Supp. 518.

Defendant failed to provide plaintiff with a reasonably safe place in which to perform his contract with the Government. Hinds v. Wheadon, 19 C. 2d 458. Captain Jones, as a result of a survey, recommended a de-dudding operation. This was not done because of expense involved. Defendant's failure to make the area safe is not excused by reason of the potential cost of such an undertaking.

In view of the condition of the strafing range, the defendant had the additional duty of giving ample warning to plaintiff of the dangers likely to be encountered. This is especially so in view of the hidden nature of the explosive materials. Freeman v. Nickerson, 77 C.A. 2d 40.

Defendant not only failed to give sufficient warn-

ing to plaintiff, but also failed to make a careful inspection itself in order to locate the dangers which might be encountered. Plaintiff was not adequately informed by defendant as to conditions on the range. Actually, he was misled by the incomplete data furnished him by defendant's employees. Humphrey v. Star Petroleum Co., 110 C.A. 15.

Under the circumstances of plaintiff's contract with the Government, defendant had a duty of care commensurably high with the extreme danger involved. Rudd v. Byrnes, 156 Cal. 636. Neither expense nor manpower should have been spared to de-dud the area in question in view of the Government's determination to dispose of the range's scrap contents for profit.

The fact that soldiers employed by plaintiff, himself, participated in the scrap collecting and that one of them handed or tossed the fatal dud to plaintiff is immaterial so far as freeing defendant from liability. Such conduct on the part of the military personnel did not give rise to the status of an intervening cause so as to cut off defendant's liability. The conduct in question was usual and expected under the circumstances and merely made possible the explosion caused by defendant's own negligence in failing to clear the range or, in the alternative, safely marking it for those engaged in collecting scrap. Rae v. California Equipment Co., 12 C. 2d 563. Cf. Stewart v. United States, 186 F. 2d 627.

Defendant argues that plaintiff is barred from recovery by reason of having assumed the risk of

his undertaking. Such is not the law. The fact that plaintiff, as an independent contractor, sought to collect scrap metal from the strafing range, does not absolve defendant from the duty of care which a landowner has toward a business invitee. Plaintiff entered the premises in the latter capacity, despite the role he performed as an independent contractor in recovering metal which he purchased from the Government. It is, of course, true that there is no duty on the part of a defendant to warn an independent contractor of ordinary dangers incident to the type of work to be performed (Louisville v. Newland, 195 S.W. (Ky.) 415), but "duds" on defendant's premises do not fall within the orbit of ordinary dangers.

As previously stated, defendant, as landowner, owed plaintiff, as business invitee, a duty of disclosing the fact that unknown hazards existed on the strafing range. Plaintiff did not assume the risk of such unknown dangers when he engaged in his business of collecting scrap metals.

The Court is unable to agree with defendant that plaintiff assumed the risk of this particular explosion. The evidence fails to establish plaintiff's familiarity with explosives such as those encountered or likely to be encountered on the artillery range. His own training during the war was in demolition work in which he participated in the destruction or removal of buildings. He was untrained in detonation of artillery shells or duds or in the firing of artillery.

On the Court's motion the case is re-opened on

the issue of damages to the end that medical testimony may be supplied with respect to the present physical condition of the plaintiff herein caused by the injuries suffered. In addition, the Court desires additional evidence and discussion on the matter of the damages proximately flowing from the negligence of the defendant. The time of hearing may be set by the Clerk of the Court convenient to the parties. Prior to the hearing plaintiff to submit to a medical examination by a physician and surgeon appointed and designated by the defendant.

Dated May 4th, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed May 4, 1951.

[Title of District Court and Cause.]

SUPPLEMENTAL CLAIM OF LIEN

To the Honorable, the above-entitled Court, and to defendant United States of America and the United States Attorney:

The undersigned, Industrial Indemnity Company, a corporation, hereby requests the above-entitled Court to determine and allow as a lien the further sum of Two Hundred and Fourteen Dollars and Ten Cents ($214.10) against any judgment which may be made and entered in favor of plaintiff John Phillip White in the above-entitled action.

This request and supplemental claim of lien is

for the reasonable expenses incurred by or on behalf of said plaintiff for medical treatment and hospitalization to cure and relieve him from the effects of the injuries set forth in the First Amended Complaint herein, which said sum was paid by said Industrial Indemnity Company for or on behalf of plaintiff since the filing of the original claim of lien herein on November 6, 1950.

At the time of the accident and injuries set forth in the First Amended Complaint on file herein, plaintiff John Phillip White was acting within the course and scope of his employment by Mars Metal Company, 1200 Minnesota Street, San Francisco, California. At said time plaintiff was covered by a Workman's Compensation Insurance Policy issued by the undersigned to said Mars Metal Company, and said Two Hundred and Fourteen Dollars and Ten Cents ($214.10) was paid for or on behalf of plaintiff by the undersigned pursuant to said Policy.

INDUSTRIAL INDEMNITY COMPANY,

By /s/ J. V. CHAMBERS,
Lien Claimant.

The undersigned, John Phillip White, plaintiff herein, hereby consents to the requested allowance of the foregoing claim of lien.

/s/ JOHN PHILLIP WHITE,
Plaintiff.

Duly verified.

[Endorsed]: Filed July 11, 1951.

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT FOR DAMAGES

Now Comes plaintiff and for cause of action against defendant alleges as follows:

I.

This action is brought pursuant to the Federal Tort Claims Act.

II.

At all times herein mentioned, plaintiff was, until July 1, 1950, a resident of the City and County of San Francisco, State of California, which said City and County is located within the Northern District of California, Southern Division. Since July 1, 1950, plaintiff has been and now is a resident of the City of Sausalito, County of Marin, State of California, which said City and County are located within the Northern District of California, Southern Division.

III.

At all times herein mentioned, the United States of America owned and operated an Army base known as Camp Beale, located at Marysville, California.

IV.

At all times herein mentioned, plaintiff was, until on or about May 1, 1949, the employee of Mars Metal Company, a co-partnership, with its place of business located at No. 1200 Minnesota Street, San Francisco, California.

V.

On or about November 18, 1946, said Mars Metal Company entered into a written contract with the United States of America for the collection of metal scrap at Camp Beale, California.

VI.

On November 22, 1946, pursuant to said contract, plaintiff was supervising on behalf of said Mars Metal Company the collection of scrap metal from the strafing range adjacent to Firing Ranges 9 and 10B at Camp Beale, to the knowledge of defendant United States of America, its agents, servants, and employees. At said time and place, the United States of America through its agents, servants and employees, negligently and carelessly permitted unexploded shells to remain on said strafing range and negligently and carelessly failed and neglected to warn plaintiff of the presence of the same.

VII.

As a result of said negligence and carelessness, plaintiff discarded what appeared to be a non-explosive shell, and the same thereupon exploded in his immediate presence, fragments thereof penetrating both of plaintiff's feet and legs, and causing the following injuries:

(a) A compound, comminuted fracture, with loss of bone, of the shaft of the right first metatarsal;

(b) Fracture of the head and neck of the right fibula;

(c) Severance of the tendons of the right great toe;

(d) Multiple wounds of both lower extremities;

(e) Limitation of motion in the left ankle;

(f) Multiple shrapnel fragments in both lower extremities;

(g) Recurrent trophic ulceration of the bottom of the left foot;

(h) Injury to the nerves, muscles, and tendons in both feet and legs;

(i) Severe nervous shock, pain and suffering.

VIII.

For some time prior to said accident, plaintiff was employed as a metal salesman, and his earnings from said employment were approximately Two Hundred and Fifty Dollars ($250.00) per month. As a result of said negligence and carelessness and said injuries, plaintiff was unable to engage in his said employment for a period of seventeen (17) weeks to his damage in the sum of One Thousand Dollars ($1,000.00). Thereafter, plaintiff's earnings from said employment were approximately Four Hundred Dollars ($400.00) per month. Thereafter plaintiff was unable to engage in said employment for a period of fifteen (15) weeks to his further damage in the sum of approximately One Thousand Four Hundred Dollars ($1,400.00). Subsequently, his earnings from said employment were approximately Six Hundred ($600.00) to Seven Hundred Dollars ($700.00) per month. As a result of said negligence and carelessness and said in-

juries, plaintiff lost approximately one-sixth (1/6) to one-seventh (1/7) of his working time for a period of twenty-three (23) months, to his further damage in the sum of approximately Two Thousand Three Hundred Dollars ($2,300.00).

IX.

As a result of said carelessness, negligence, and said injuries, plaintiff required the services of an ambulance from Camp Beale to Mary's Help Hospital, San Francisco, California. The cost of said ambulance was and is the sum of One Hundred and Fifteen Dollars ($115.00), and said sum was and is the reasonable cost and value thereof.

X.

As a result of said negligence and carelessness, and said injuries, plaintiff was compelled to engage the services of physicians and surgeons. The cost of said services of said physicians and surgeons was and is the sum of $946.93, and said sum was and is the reasonable cost and value thereof. As a result of said negligence and carelessness, and said injuries, plaintiff has been compelled to obtain X-rays, drugs, equipment, and hospitalization. The total cost of said X-rays, drugs, equipment, and hospitalization was and is the sum of $2,319.26, and said sum was and is the reasonable cost and value thereof.

XI.

As a result of said carelessness, negligence, and said explosion, plaintiff has sustained permanent

injuries which will require the further services of physicians and surgeons, hospitalization, X-rays, drugs, and equipment, for the duration of plaintiff's life, and as a result thereof, plaintiff will sustain further and additional loss of working time for the remainder of his life.

XII.

By reason of the foregoing facts plaintiff has been damaged in the sum of Sixty-Three Thousand Eight Hundred and Eighty-One Dollars and Nineteen Cents ($63,881.19), no part of which has been paid.

Wherefore, plaintiff prays judgment against defendants in the sum of Sixty-Three Thousand Eight Hundred and Eighty-One Dollars and Nineteen Cents ($63,881.19), together with interest and costs incurred herein, and such other and further relief as this Court may deem just and proper.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed July 11, 1951.

In the United States District Court, Northern District of California, Southern Division

No. 27740-H

JOHN PHILLIP WHITE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

Plaintiff, following the presentation of additional evidence on the question of damages, has submitted a computation as set forth in his second amended complaint. After reviewing such computation in the light of the evidence, the Court is prepared to make the following findings:

The Court specifically finds in connection with the injuries sustained by the plaintiff that the same are permanent to the extent that he has suffered and will continue to suffer from an open ulcer in the right foot. He has limitations therein which will persist, according to medical testimony undisputed, over the period of his lifetime. In addition, the Court finds that through testimony submitted by the plaintiff through the medium of Dr. Morrissey that the plaintiff will require yearly medical attention and hospitalization. Under the conditions, therefore, prospective amounts should be and properly are allowed as to medical expenses and future pain and suffering.

Accordingly, it is the judgment of the Court that special damages be, and they hereby are, awarded plaintiff in the amount of $8,081.19; general damages be, and they hereby are, awarded plaintiff in the amount of $47,000, or a total of $55,081.19.

Dated August 6, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION TO REOPEN CAUSE FOR ADMISSION OF DOCUMENT IN EVIDENCE AND FOR ENTRY OF FORMAL ORDER AUTHORIZING FILING OF SECOND AMENDED COMPLAINT

To defendant United States of America and to Chauncey Tramutolo, United States Attorney and Rudolph J. Scholz, Assistant United Attorney:

Please take notice that plaintiff will move the above-entitled Court, in the courtroom of the Honorable George B. Harris, District Judge, Room 276, Post Office Building, San Francisco, California, on October 3, 1951, at the hour of 10 a.m. of said day, or as soon thereafter as counsel may be heard, to reopen the above cause for the purpose of admit-

ting in evidence a certain letter dated September 19, 1951, between the Industrial Indemnity Company, plaintiff John Phillip White, M. S. Huberman, and Leonard J. Bloom, and to make and enter a formal order authorizing the filing of plaintiff's Second Amended Complaint herein.

The reason for the admission in evidence of this letter is to fully inform the Court of the agreement between the plaintiff John Phillip White, the Industrial Indemnity Company, lien claimant, and their attorneys to enable the Court to make and enter a proper judgment in the action. The reason for the formal order respecting the filing of plaintiff's Second Amended Complaint is the fact that the United States Attorney has declined to sign a written stipulation covering the filing of said Second Amended Complaint.

Said motion will be, and is hereby, based on the draft of the proposed order, a true and correct copy of the aforesaid letter dated September 19, 1951, the affidavit of Leonard J. Bloom, the points and authorities on which plaintiff relies, all of which documents are attached hereto, all of the papers and records in the above action, and such oral testimony as may be adduced at the hearing of this motion.

Dated September 24, 1951.

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 24, 1951.

AFFIDAVIT OF LEONARD J. BLOOM

State of California,
City and County of San Francisco—ss.

Leonard J. Bloom, being first duly sworn, deposes and says:

I am one of the attorneys for plaintiff John Phillip White and Industrial Indemnity Company, lien claimant, and the facts herein stated are within my knowledge.

On July 11, 1951, plaintiff moved the Court for permission to file his Second Amended Complaint to conform to proof and to cover matters which had occurred subsequent to the filing of the First Amended Complaint. After affiant had so moved the Court, the following proceedings occurred:

The Court: Well, may the answer on file as embodied in that answer on behalf of the United States of America be deemed the answer to the second amended complaint?

Mr. Bloom: Certainly, your Honor.

The Court: Counsel for the Government, the answer on file may be deemed to be the answer to this second amended complaint.

Mr. Scholz: I was going to say, your Honor, that of course we have had no time to plead to it. We just received it. But I don't think the answer on file would cover those other allegations. If your Honor is going to admit that, I would think that the best thing to do would be to stipulate that all the matter contained therein is denied.

Mr. Bloom: That is satisfactory.

The Court: Save and except such items as may have been stipulated to.

Mr. Scholz: That's right, or admitted in the original answer.

The Court: Well, I think you had better file a written stipulation on that.

Mr. Bloom: Very well.

Thereafter, affiant tendered to Rudolph J. Scholz, Assistant United States Attorney, a proposed stipulation in accordance with the above proceeding. On August 23, 1951, the United States Attorney, by and through said Rudolph J. Scholz, advised affiant by letter that the United States Attorney declined to sign the stipulation theretofore tendered.

At said proceeding on July 11, 1951, plaintiff was permitted by the Court to file said Second Amended Complaint, which was then done. In view of the foregoing proceedings on July 11, 1951, and the declination of the United States Attorney to sign the contemplated stipulation, it would appear desirable to reopen the cause for the making and entry of a formal order confirming the fact that the Second Amended Complaint was and has been filed by leave of Court.

In reference to the letter of September 19, 1951, confirming the agreement between plaintiff John Phillip White, the Industrial Indemnity Company, lien claimant, and their attorneys, this letter sets forth the agreement, subject to the Court's approval, between the parties respecting the payment of attorneys' fees. It is deemed desirable to pre-

sent the Court with this understanding so that the Court may have before it information necessary or helpful in the making or preparation of its judgment herein.

/s/ LEONARD J. BLOOM.

Subscribed and sworn to before me this 24th day of September, 1951.

[Seal] /s/ ANNE C. MINIHAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires October 17, 1954.

(Copy)

Law Offices
Kennedy & Bloom
57 Post Street
San Francisco 4, California
402 Albert Building
San Rafael, California

September 19, 1951.

Industrial Indemnity Company,
155 Sansome Street,
San Francisco, California.

Re: John Phillip White vs. United States of America, No. 27740 H, Workman's Compensation Policy (Mars Metal Company) No. 546-00829

Gentlemen:

This letter is written to confirm the agreement made prior to the inception of the above litigation

between you, John Phillip White, and us, concerning the conduct of the litigation, responsibility for costs, and payment of legal fees.

It is our understanding that it was agreed that White should prosecute the action in his own name as party plaintiff for the recovery of all of the damages sustained, including medical and other expenses paid and satisfied by the Industrial Indemnity Company pursuant to the above policy, a Workman's Compensation Policy in the usual form theretofore issued to Mars Metal Company and in effect at the time of the accident. It was further agreed that the subrogated interest of the Industrial Indemnity Company in the recovery should be disclosed to the Court and asserted by the filing of appropriate claims of lien showing the full amount expended by the Industrial Indemnity Company under said policy, including any and all temporary disability payments made to White. Such claims of lien, as you know, have been filed in the above proceeding.

It was further agreed that we would act as counsel for both White and the Industrial Indemnity Company in the prosecution and trial of the above action, and in the preparation and filing of the aforesaid claims of lien, and that we would so advise the Court. The Court was so advised at the trial.

It was further agreed that plaintiff White would be responsible for all costs and expenses except as specifically otherwise agreed. During the course of the trial you agreed to pay the witness fees of

White's physician, Dr. Edmund J. Morrissey. In respect to attorneys' fees, it was agreed that we should undertake the case on a contingent fee basis, and that we should receive, subject to the approval of the Court, twenty per cent (20%) of the recovery, said attorneys' fees to be apportioned between you and White in proportion to your respective interests in the recovery.

The total recovery in the action was the sum of $55,081.19. The aggregate amount of the claims of lien filed by the Industrial Indemnity Company was $4,652.64. Subject to the Court's approval, the total attorneys' fees on the aforesaid twenty per cent (20%) basis would be $11,016.24, of which $930.53 would be chargeable to you, leaving a net balance due you of $3,722.11.

Very truly yours,

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM.

We hereby confirm the above agreement:

INDUSTRIAL INDEMNITY COMPANY,

By /s/ Illegible,
Claims Manager.

/s/ JOHN PHILLIP WHITE.

Points and Authorities

(1) The Court has the authority to authorize the filing of amended and supplemental pleadings.

Federal Rules of Civil Procedure, Rule 15.

(2) In proceedings brought under the Federal Tort Claims Act, the Court is empowered to fix and determine attorney's fees.

28 U.S.C.A. Sec. 2678.

Respectfully submitted,

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff.

[Endorsed]: Filed September 24, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that judgment entered against it and in favor of John Phillip White on May 4, 1951.

Dated September 28, 1951.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed October 1, 1951.

[Title of District Court and Cause.]

ORDER REOPENING CAUSE FOR ADMISSION OF LETTER IN EVIDENCE AND AUTHORIZING FILING OF SECOND AMENDED COMPLAINT

The motion of plaintiff for the order of this Court reopening the above-entitled cause for the admission in evidence of a certain letter dated September 19, 1951, between plaintiff John Phillip White, the Industrial Indemnity Company, lien claimant, and their attorneys, and for the making and entry of a formal order of this Court authorizing the filing of plaintiff's Second Amended Complaint, came on regularly before the above Court on October 3, 1951. M. S. Huberman and Leonard J. Bloom appeared as attorneys for plaintiff, and Rudolph J. Scholz, Assistant United States Attorney, appeared as attorney for defendant United States of America. Said motions were thereupon made and argued and the Court being fully advised in the premises, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed as follows:

(1) That the above-entitled action be, and the same is hereby, reopened.

(2) That the letter dated September 19, 1951, between plaintiff John Phillip White, the Industrial Indemnity Company, lien claimant, and their attorneys be, and the same is hereby admitted in evidence.

(3) That this Court hereby confirms that plaintiff's Second Amended Complaint was filed herein on July 11, 1951, by permission of this Court, and the filing of said Second Amended Complaint is hereby formally ratified and authorized.

(4) That each and every allegation contained in said Second Amended Complaint which does not appear in plaintiff's original Complaint shall be deemed denied by defendant, save and except such matters as may have been stipulated to.

(5) That the memoranda opinions and orders for judgment dated and filed herein on May 4, 1951, and August 6, 1951, be, and they are, hereby reaffirmed and reissued in their entirety.

Dated October 3, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed October 5, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 2nd day of November, 1950, before the Court sitting without a jury, M. S. Huberman, Esq., and Leonard J. Bloom, Esq., appearing as attorneys for plaintiff, and Rudolph J. Scholz, Esq., Assistant United States Attorney, appearing as at-

torney for defendant. Evidence both oral and documentary was introduced and the cause submitted for decision. On May 4, 1951, the Court filed a memorandum opinion and order in favor of plaintiff, and on the Court's motion, re-opened the case for the introduction of further evidence on the issue of damages. Thereafter, on July 11, 1951, further evidence was introduced on the issue of damages, and the cause submitted for decision. This Court now finds the facts and states the conclusions of law as follows:

Findings of Fact

I.

The action was brought pursuant to the Federal Tort Claims Act (28 U.S.C.A., Sec. 1346(b)). At all times mentioned in the Second Amended Complaint, plaintiff John Phillip White has been, and now is, a resident of the Northern District of California, Southern Division. The accident set forth in said Second Amended Complaint occurred on November 22, 1946, at Camp Beale, Marysville, California, which is located within the Northern District of California, Southern Division. The matter in controversy, or the claim of plaintiff against defendant, exclusive of interest and costs, exceeds the sum of One Thousand Dollars ($1,000.00).

II.

At all times mentioned in these findings of fact, defendant United States of America owned and operated an army base known as Camp Beale, and located at Marysville, California.

III.

On November 22, 1946, and for several months prior thereto, plaintiff John Phillip White was an employee of Mars Metal Company, a co-partnership, with its place of business located at No. 1200 Minnesota Street, San Francisco, California.

IV.

On October 16, 1946, the War Department extended an invitation to all those interested in bidding on the purchase and recovery of spent bullet metal on the firing ranges at Camp Beale. The Government invited all bidders to inspect the property prior to the submission of bids. Pursuant to this invitation, plaintiff John Phillip White, on behalf of said Mars Metal Company, visited Camp Beale in September and October of 1946. Thereafter, on November 18, 1946, the Government, through Captain Charles D. Pitrie, acting within the scope of his employment by defendant United States of America, accepted the bid of Mars Metal Company. The contract provided for the sale to Mars Metal Company of nonferrous scrap metal at a specific price and included the right to gather all nonferrous metals on firing ranges from firing line to point at which unstopped bullets might fall.

V.

On November 22, 1946, plaintiff John Phillip White was collecting scrap metal, pursuant to said contract between the United States of America and Mars Metal Company, and as an employee of Mars

Metal Company, on the strafing range adjacent to firing ranges 9 and 10B at Camp Beale, with the assistance of certain off-duty troop personnel employed for the purpose with the consent of their superior officers. While so engaged, plaintiff John Phillip White received the injuries hereinafter described from the explosion of a dud.

VI.

At the time of John Phillip White's entry on said strafing range, and prior thereto, and at the time of said accident, the United States of America had knowledge that the presence of unexploded shells or duds on said strafing range was a strong possibility. In October of 1946, Captain Robert Sumner Jones, the post range officer, acting within the scope of his employment by defendant United States of America, conducted a survey of the Camp Beale firing ranges, including said strafing range. On the basis of this survey, Captain Jones, acting within the scope of said employment, recommended that dedudding operations be undertaken because of the presence of unexploded shells. This recommendation was rejected because of the expense involved.

VII.

On November 22, 1946, and prior thereto, the United States of America knew that the presence of unexploded shells, or duds, on said strafing range was an extra hazardous condition, or condition of extreme danger, to any person entering thereon, in that the slightest disturbance or vibration of the same was likely to explode such duds.

VIII.

The United States of America failed to provide plaintiff John Phillip White with a reasonably safe place in which to perform the work under the said contract between the United States of America and Mars Metal Company. As aforesaid, Captain Jones, the post range officer, had made a survey of said strafing range showing the presence of unexploded shells or duds and had recommended that the Government undertake dedudding operations, but this recommendation was rejected because of the expense involved. Said strafing range at the time of said accident was grass covered, and visual inspection alone could not detect the presence of hidden duds. Electrical or other scientific detecting devices were available and known to the United States of America at the time of the accident, but were not used by the United States of America because of the expense thereof.

IX.

Defendant United States of America failed and neglected to warn plaintiff John Phillip White, prior to said accident, of the danger, known to the United States of Ameirca, of the likelihood of his encountering unexploded shells or duds on the said strafing range. Defendant United States of America failed and neglected to warn plaintiff John Phillip White, prior to said accident, that mere ground vibration caused by walking near an unexploded shell or dud might detonate the same. Defendant United States of America failed and neg-

lected to warn plaintiff John Phillip White, prior to said accident, that a survey made by the post range officer immediately prior to the accident disclosed that said strafing range was in an extremely hazardous condition because of the presence of unexploded shells or duds thereon. Defendant United States of America failed and neglected to explain to plaintiff John Phillip White, prior to said accident, that there had been no use of any scientific electrical or mechanical equipment to locate unexploded shells or duds on said strafing range prior to the entry of plaintiff thereon.

X.

Defendant United States of America actually represented to plaintiff John Phillip White that said strafing range was a safe area on which to perform his work. The Sergeant in charge of said strafing range, under said post range officer, acting within the scope of his employment by defendant United States of America, told plaintiff John Phillip White prior to his entry on said strafing range that the same was in a safe condition except for a certain marked dud which he specifically pointed out to plaintiff. Said Sergeant told plaintiff John Phillip White, prior to his entry on said strafing range, that the range had not been used for approximately two years. Further, he showed plaintiff a solid iron 37 millimeter non-explosive anti-tank projectile, and advised him that he was likely to find many of them on the strafing range.

The projectile which caused the explosion in question was closely similar in appearance to one of these solid iron projectiles, whereas, in actual fact, it was a 37 millimeter anti-personnel projectile with an explosive warhead. Said Sergeant knew that army personnel was assisting plaintiff John Phillip White immediately prior to said explosion, but said Sergeant gave no warning to plaintiff other than to admonish him to instruct said personnel to stay away from the marked dud.

XI.

On November 22, 1946, plaintiff John Phillip White and his helpers were engaged in picking up or collecting cartridges from said strafing range. While so engaged, one of plaintiff's helpers, Private Lang, one of the aforesaid off-duty Camp Beale army personnel, picked up what appeared to be one of said solid iron 37 millimeter anti-tank projectiles and asked plaintiff whether he was interested in the same. Plaintiff replied in the negative, and almost simultaneously, Private Lang pitched or handed the projectile to plaintiff, who dropped the same. The projectile was in plaintiff's hand but a fraction of a second. He did not have time to grasp the projectile or inspect it. Upon hitting the ground, said projectile exploded, causing injury to Private Lang and the injuries to plaintiff hereinafter described. The projectile which exploded was apparently a 37 millimeter anti-personnel projectile with an explosive warhead similar in appearance to a non-explosive 37 milli-

meter iron anti-tank projectile. The act of Private Lang of picking up, and handing or tossing the said projectile to plaintiff John Phillip White was a normal and natural act incident to the collection of scrap metal from said strafing range and was foreseeable by defendant United States of America. Said conduct on the part of Private Lang did not in any way constitute an intervening cause relieving defendant United States of America of liability to plaintiff John Phillip White for the injuries sustained by him as a result of said explosion.

XII.

The conduct of defendant United States of America, acting by and through its servants, agents, and employees within the scope of their employment, in permitting plaintiff John Phillip White to enter upon and work on said strafing range on November 22, 1946, constituted, under the circumstances hereinabove set forth, negligence on the part of defendant United States of America to plaintiff John Phillip White, and said negligence was the direct, natural, foreseeable, and proximate cause of the said explosion and of the injuries, hereinafter described, sustained by plaintiff John Phillip White.

XIII.

All of the aforesaid acts of negligence, misrepresentation, and neglect by defendant United States of America proximately causing said explosion, as aforesaid, were acts of negligence, misrepresentation, and neglect by agents, servants, and

employees of defendant United States of America acting within the course and scope of their employment.

XIV.

Plaintiff John Phillip White had no familiarity with explosives such as those encountered or likely to be encountered on said strafing range. He was untrained in detonation of artillery shells or duds or in the firing of artillery. The only prior demolition training received by plaintiff in his war service was confined to the destruction or removal of buildings. There was no basis for any assumption by defendant United States of America that plaintiff John Phillip White was experienced or trained in the detection or decontamination of artillery shells or duds. Plaintiff John Phillip White did not assume the risk of the aforesaid explosion. Said explosion and the injuries and damages sustained by plaintiff John Phillip White were not due to or caused by an unavoidable accident. Plaintiff John Phillip White was not guilty of carelessness or negligence proximately contributing to said explosion and said injuries sustained by him, and there was no contributory negligence by plaintiff John Phillip White. The conditions complained of in plaintiff's Second Amended Complaint were not open, patent, or obvious conditions and were not known to plaintiff John Phillip White.

XV.

As a result of the aforesaid explosion, metallic fragments penetrated both of plaintiff's feet and legs, causing the following injuries:

(a) A compound, comminuted fracture, with loss of bone, of the shaft of the right first metatarsal;

(b) Fracture of the head and neck of the right fibula;

(c) Severance of the tendons of the right great toe;

(d) Multiple wounds of both lower extremities;

(e) Limitation of motion in the left ankle;

(f) Multiple shrapnel fragments in both lower extremities;

(g) Recurrent trophic ulceration of the bottom of the left foot;

(h) Injury to the nerves, muscles, and tendons in both feet and legs;

(i) Severe nervous shock, pain and suffering.

As a result of said injuries, plaintiff has sustained intense pain and suffering, continuously from the date of said explosion, and will continue to suffer the same for the remainder of his natural life. Said pain and suffering has been, and will be, acute, upon the recurrent flaring up of the ulcer of the left foot, which condition will persist for the remainder of plaintiff's life. The aforesaid permanent injuries interfere with and impede plaintiff's usual and normal physical activities in the pursuit of his business and recreational affairs, and such condition will continue for the remainder of plaintiff's life.

XVI.

For some time prior to said accident, plaintiff was employed as a metal salesman, and his earn-

ings from said employment were approximately Two Hundred and Fifty Dollars ($250.00) per month. As a result of said negligence and carelessness and said injuries, plaintiff was unable to engage in his said employment for a period of seventeen (17) weeks to his damage in the sum of One Thousand Dollars ($1,000.00). Thereafter, plaintiff's earnings from said employment were approximately Four Hundred Dollars ($400.00) per month. Thereafter plaintiff was unable to engage in said employment for a period of fifteen (15) weeks to his further damage in the sum of approximately One Thousand Four Hundred Dollars ($1,400.00). Subsequently, his earnings from said employment were approximately Six Hundred Dollars ($600.00) to Seven Hundred Dollars ($700.00) per month. As a result of said negligence and carelessness and said injuries, plaintiff lost approximately one-sixth (1/6) to one-seventh (1/7) of his working time for a period of Twenty-three (23) months, to his further damage in the sum of approximately Two Thousand Three Hundred Dollars ($2,300.00).

XVII.

As a result of said carelessness, negligence, and said injuries, plaintiff required the services of an ambulance from Camp Beale to Mary's Help Hospital, San Francisco, California.

XVIII.

As a result of said negligence and carelessness, and said injuries, plaintiff was compelled to engage

the services of physicians and surgeons. As a result of said negligence and carelessness, and said injuries, plaintiff has been compelled to obtain X-rays, drugs, equipment, and hospitalization. The total cost of said ambulance, services of physicians and surgeons, X-rays, drugs, equipment and hospitalization was and is the sum of Three Thousand Three Hundred Eighty-one Dollars and Nineteen Cents ($3,381.19), and said sum was and is the reasonable cost and value thereof.

XIX.

Plaintiff John Phillip White was born on January 22, 1911. His life expectancy on the date of said accident, to wit, November 22, 1946, was and is 34.36 years, and his life expectancy on the last day of the trial of this action, to wit, July 11, 1951, was and is 30.03 years. As a result of said carelessness, negligence, and said explosion, plaintiff John Phillip White has sustained permanent injuries which will require the further services of physicians and surgeons, hospitalization, X-rays, drugs, and equipment, for the duration of his natural life, and as a result thereof, plaintiff John Phillip White will also sustain further and additional loss of working time for the remainder of his life.

XX.

By reason of said carelessness and negligence of defendant United States of America, and said explosion, plaintiff John Phillip White sustained special damages, as aforesaid, in the total sum of Eight

Thousand Eighty-one Dollars and Nineteen Cents ($8,081.19), and general damages in the sum of Forty-seven Thousand Dollars ($47,000.00).

XXI.

On November 6, 1950, with leave of Court, the Industrial Indemnity Company, a corporation, filed herein its Claim of Lien. On July 11, 1951, said Industrial Indemnity Company, with leave of Court, filed herein its Supplemental Claim of Lien. At the time of said explosion, plaintiff John Phillip White was covered by a Workman's Compensation Insurance Policy issued by said Industrial Indemnity Company to said Mars Metal Company. Pursuant to said Policy, said Industrial Indemnity Company expended the sum of Three Thousand Three Hundred and Eight-one Dollars and Nineteen Cents ($3,381.19) for medical treatment and hospitalization to cure and relieve plaintiff John Phillip White from the effects of the injuries sustained by him, as aforesaid. Said expenditures were and are reasonable and necessary. Pursuant to said policy, said Industrial Indemnity Company paid to plaintiff John Phillip White temporary disability payments in the total sum of One Thousand Two Hundred Seventy-one Dollars and Forty-five Cents ($1,271.45) for or on account of the injuries sustained by him in said explosion. Said Industrial Indemnity Company has a lien against any judgment awarded herein to plaintiff John Phillip White in the total sum of Four Thousand Six Hundred and Fifty-two Dollars and Sixty-Four Cents ($4,652.64).

XXII.

M. S. Huberman and Leonard J. Bloom, Attorneys at Law, have been and are the attorneys who represented, and represent, plaintiff John Phillip White and said Industrial Indemnity Company in the presentation of their respective claims, and in the trial of this action. Said attorneys have rendered valuable legal services to plaintiff John Phillip White and said Industrial Indemnity Company, and said services were and are of the reasonable value of twenty per cent (20%) of the total damages of Fifty-five Thousand Eighty-one Dollars and Nineteen Cents ($55,081.19), hereinabove found, or the sum of Eleven Thousand Sixteen Dollars and Twenty-four Cents ($11,016.24).

Conclusions of Law

(1) That this Court has jurisdiction of this cause;

(2) That on November 22, 1946, plaintiff entered upon said strafing range and was engaged as above described at the time of said explosion as a business invitee of defendant United States of America;

(3) That defendant United States of America, through its agents, servants, and employees, acting within the scope of their employment, negligently and carelessly permitted unexploded shells or duds to remain on said strafing range, and negligently and carelessly failed and neglected to warn plaintiff John Phillip White of the presence of the same;

(4) That said negligence and carelessness of defendant United States of America was the proximate cause of the explosion and injuries sustained by plaintiff John Phillip White;

(5) That defendant United States of America is liable to plaintiff John Phillip White for the aforesaid injuries sustained by him by reason of the breach by defendant United States of America, and by its agents, servants and employees acting within the scope of their employment, of the following duties owed to plaintiff John Phillip White under the laws of the State of California as of the time of said explosion:

(a) The duty to provide plaintiff John Phillip White with a reasonably safe place for him, as a business invitee, to perform the work under said contract;

(b) The duty to warn plaintiff John Phillip White, as a business invitee, of the hidden danger from unexploded shells or duds likely to be encountered on said strafing range;

(c) The duty of defendant United States of America to make a proper or necessary inspection of said strafing range prior to the entry of plaintiff John Phillip White thereon for the purpose of ascertaining its condition and locating hidden or latent danger;

(d) The duty of defendant United States of America to correct or eliminate the known hazardous condition of said strafing range prior to

permitting plaintiff John Phillip White, a business invitee, to enter and work thereon;

(6) That defendant United States of America owed to plaintiff John Phillip White under the laws of the State of California a high degree of care commensurate with the extreme hazard or danger to life and limb arising from the presence of high explosives on said strafing range;

(7) That defendant United States of America is liable to plaintiff John Phillip White for damages for the injuries sustained by him under the laws of the State of California by reason of the misrepresentation by defendant United States of America, through its agents, servants and employees, acting within the scope of their employment, to plaintiff John Phillip White, a business invitee, that the said strafing range was a safe place for him to perform the work under said contract;

(8) That the said negligence of defendant United States of America was the direct and proximate cause of said explosion and of said injuries to plaintiff John Phillip White, and there was no intervening cause relieving defendant United States of America from its liability to plaintiff John Phillip White for said injuries;

(9) That said explosion and the injuries and damages sustained by plaintiff John Phillip White were not due to or caused by an unavoidable accident, nor did plaintiff John Phillip White assume the risk of such an explosion;

(10) That plaintiff John Phillip White was not guilty of carelessness or negligence proximately contributing to said explosion and said injuries sustained by him, and that there was no contributory negligence by plaintiff John Phillip White;

(11) That plaintiff John Phillip White recover from defendant United States of America special damages in the sum of Eight Thousand Eighty-one Dollars and Nineteen Cents ($8,081.19), and general damages in the sum of Forty-seven Thousand Dollars ($47,000.00), or total damages in the sum of Fifty-five Thousand Eighty-one Dollars and Nineteen Cents ($55,081.19);

(12) That of said total sum of Fifty-five Thousand Eighty-one Dollars and Nineteen Cents ($55,081.19), the sum of Four Thousand Six Hundred and Fifty-two Dollars and Sixty-four Cents ($4,652.64), less attorneys' fees in the sum of Nine Hundred Thirty Dollars and Fifty-three Cents ($930.53), or a net balance of Three Thousand Seven Hundred and Twenty-two Dollars and Eleven Cents ($3,722.11), be paid to the Industrial Indemnity Company, a corporation, in satisfaction of its said lien; that twenty per cent (20%) of said Fifty-five Thousand Eightly-one Dollars and Nineteen Cents ($55,081.19), or the sum of Eleven Thousand Sixteen Dollars and Twenty-four Cents ($11,016.24) be paid to M. S. Huberman and Leonard J. Bloom as and for attorneys' services rendered by them herein; and that the balance be paid to plaintiff John Phillip White.

Judgment is hereby ordered to be entered accordingly.

Dated this 18th day of Oct., 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

Receipt of copy acknowledged.

Lodged October 5, 1951.

[Endorsed]: Filed October 13, 1951.

In the United States District Court, Northern District of California, Southern Division

No. 27740 H

JOHN PHILLIP WHITE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial before the Court, sitting without a jury, and the evidence adduced by the parties having been heard, and the cause submitted for decision, the Court made its findings of fact and conclusions of law.

A claim of lien and a supplemental claim of lien in the total sum of Four Thousand Six Hundred

and Fifty-two Dollars and Sixty-four Cents ($4,652.64) have heretofore been filed herein by the Industrial Indemnity Company, a corporation. Plaintiff John Phillip White, said Industrial Indemnity Company, and their attorneys, M. S. Huberman and Leonard J. Bloom, have introduced in evidence and filed herein a letter dated September 19, 1951, ratifying and confirming, subject to the approval of this Court, the understanding and agreement among them, from the commencement of this action, covering the conduct of this litigation and their respective interests in any award which this Court might make and enter. From said letter dated September 19, 1951, said claim of lien and said supplemental claim of lien, and from the evidence and stipulations adduced during the trial of this action, it appears, and the Court finds, that said M. S. Huberman and Leonard J. Bloom have represented both plaintiff John Phillip White and said Industrial Indemnity Company in this action from the inception thereof; that said attorneys filed said claim of lien and supplemental claim of lien on behalf of said Industrial Indemnity Company with the consent and permission of plaintiff John Phillip White; that to the extent of the aggregate amount of said claims of lien, to wit, Four Thousand Six Hundred Fifty-two Dollars and Sixty-four Cents ($4,652.64), said Industrial Indemnity Company has a lien by subrogation against any judgment herein, less its rateable share of attorney's fees; that said Industrial Indemnity Company to the extent of its said subrogated claims,

has been, and now is, considered herein as being in the same position as a formal party plaintiff from the inception of this action; and that, under the provisions of said letter dated September 19, 1951, plaintiff John Phillip White and said Industrial Indemnity Company have agreed, subject to the approval of this Court, that the attorney's fees payable herein shall be rateably shared by them in proportion to their respective shares of the award made herein.

It Is Therefore Ordered, Adjudged, and Decreed as follows:

(1) That plaintiff John Phillip White do have and recover of and from defendant United States of America special damages in the sum of Eight Thousand Eighty-one Dollars and Nineteen Cents ($8,081.19), and general damages in the sum of Forty-seven Thousand Dollars ($47,000.00), or total damages in the sum of Fifty-five Thousand Eighty-one Dollars and Nineteen Cents ($55,-081.19), with interest thereon at the legal rate from the date hereof until paid, together with his costs taxed in the sum of $255.45.

(2) That defendant United States of America pay the said Fifty-five Thousand Eighty-one Dollars and Ninteen Cents ($55,081.19) to the following persons and in the following manner:

(a) To the Industrial Indemnity Company of San Francisco, California, the sum of Three Thousand Seven Hundred and Twenty-two Dollars and Eleven Cents ($3,722.11), which said sum rep-

resents the aggregate amount of their subrogated claims of lien in the amount of Four Thousand Six Hundred and Fifty-two Dollars and Sixty-four Cents ($4,652.64), less its rateable share of attorney's fees in the sum of Nine Hundred and Thirty Dollars and Fifty-three Cents ($930.53);

(b) To M. S. Huberman and Leonard J. Bloom, 57 Post Street, San Francisco, California, the sum of Eleven Thousand Sixteen Dollars and Twenty-four Cents ($11,016.24), which represents attorney's fees of twenty per cent (20%) of the total award of Fifty-five Thousand Eighty-one Dollars and Nineteen Cents ($55,081.19);

(c) To plaintiff John Phillip White, of Sausalito, California, the sum of Forty Thousand Three Hundred and Forty-two Dollars and Eighty-four Cents ($40,342.84), which represents the balance of said award after the payment of said subrogated claims of lien and said attorney's fees, together with the aforesaid legal interest and costs.

Dated October 30, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to form, as provided in Rule 5 (d):

/s/ M. S. HUBERMAN,

/s/ LEONARD J. BLOOM,
Attorneys for Plaintiff John Phillip White and Said Industrial Indemnity Company, Lien Claimant.

Approved as to form, as provided in Rule 5 (d):

CHAUNCEY TRAMUTOLO,
United States Attorney.

RUDOLPH J. SCHOLZ,
Asst. United States Attorney.

By /s/ RUDOLPH J. SCHOLZ,
Attorneys for Defendant,
United States of America.

[Endorsed]: Filed October 30, 1951.

Entered October 31, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that judgment entered against it and in favor of John Phillip White, plaintiff, on October 31, 1951.

Dated November 2, 1951.

CHAUNCEY TRAMUTOLO,
United States Attorney,

By /s/ RUDOLPH J. SCHOLZ,
Assistant United States Attorney, Attorneys for Defendant, United States of America.

[Endorsed]: Filed November 2, 1951.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION

The defendant, United States of America, moves the above-entitled Court for its order reopening the above-entitled action for admission in evidence of interrogatories and the answers thereto propounded by the plaintiff herein, and allied matters or the signed copies of the same. Said motion will be based upon all the papers, records and files in this action, including the Court Reporter's notes, and upon the ground that at the time of the trial the interrogatories had been misplaced and due search failed to locate them; that the same are material to this action.

Said motion will be made the 26th day of November, 1951, at 10:00 o'clock a.m. before the Honorable George B. Harris, in his Courtroom, No. 276, Post Office and Courthouse Building, Seventh and Mission Streets, San Francisco, California.

CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ RUDOLPH J. SCHOLZ,
Assistant United States Attorney, Attorneys for Defendant.

Authority
Federal Rules of Civil Procedure 60(b).

[Endorsed]: Filed November 19, 1951.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION

The defendant, United States of America, moves the above-entitled Court for its order amending the notice of appeal heretofore filed in this Court on October 1, 1951, by striking out the words therein "May 4, 1951" and substituting therein "August 6, 1951." Said motion will be based upon this notice, all the papers, records and files of this action and upon the grounds that through inadvertence or excusable error or neglect that the words and figures therein of "May 4, 1951" was inserted instead of "August 6, 1951" in said notice.

Said motion will be made before the above-entitled Court, Honorable George B. Harris presiding on 30th day of November, 1951, at the hour of 10:00 o'clock a.m. thereof.

CHAUNCEY TRAMUTOLO,
United States Attorney.

RUDOLPH J. SCHOLZ,
Assistant United States Attorney, Attorneys for Defendant.

Authority
Federal Rules of Civil Procedure 60(b).

[Endorsed]: Filed November 27, 1951.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 30th day of November, in the year of our Lord one thousand nine hundred and fifty-one.

Present: the Honorable George B. Harris, District Judge.

[Title of Cause.]

ORDER DENYING MOTION TO AMEND NOTICE OF APPEAL

This case came on regularly for hearing on motions to reopen and to amend notice of appeal. Messrs. Leonard J. Bloom and M. S. Huberman were present on behalf of the plaintiff, and Rudolph J. Scholz, Esq., Assistant U. S. Attorney, appeared on behalf of the Government. Mr. Leonard introduced in evidence Plaintiff's Exhibit No. 16 in connection with the motion to reopen. Mr. Scholz introduced in evidence Government's Exhibit I in connection with the motion to reopen. After hearing counsel on said motions it is Ordered that memoranda be filed in five and five days and that this case be continued to December 11, 1951, for submission of the motion to reopen. It is further Ordered that the motion to amend notice of appeal be denied.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION TO RE-OPEN CASE

This matter having been briefed and submitted for ruling,

It Is Ordered that defendant's motion to re-open the above-entitled case be, and the same hereby is, denied.

Dated December 26, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed December 26, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the defendant and appellant herein may have to and including the 25th day of January, 1952, to file the record on appeal in the United States Court of Appeals for the Ninth Circuit.

Dated November 2, 1951.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed November 2, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal as designated by the attorney for the appellant:

Complaint for damages.

Answer to complaint.

Interrogatories propounded by plaintiff.

Stipulation respecting filing of first amended complaint.

First amended complaint for damages.

Motion for production of documents.

Affidavit in support of motion for order to produce documents.

Order for production and inspection of documents.

Claim of lien of Industrial Indemnity Co.

Memorandum opinion and order.

Supplemental claim of lien by Industrial Indemnity Co.

Second amended complaint for damages.

Order fixing damages.

Notice of motion to reopen cause, etc.

Notice of appeal dated September 28, 1951.

Order reopening cause for admission of letter, etc.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal dated November 2, 1951.

Statement of points to be relied upon on appeal.

Motion and notice of motion to reopen cause for admission in evidence of interrogatories, etc.

Motion to amend notice of appeal.

Order denying motion to amend notice of appeal.

Order denying motion to reopen case.

Designation of contents of record on appeal.

Order extending time to docket record on appeal.

Reporter's Transcript, November 2, 3, 1950.

Reporter's Transcript, November 6, 1950.

Reporter's Transcript, July 11, 1951.

Reporter's Transcript, October 3, 1951.

Plaintiff's Exhibits 1 to 16A.

Defendant's Exhibits A to I (B for identification same as Plaintiff's 15).

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 9th day of January, 1952.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13226. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. John Phillip White, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 9, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13226

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN PHILLIP WHITE,
Appellee.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

That the trial Court erred.

(1) in finding that John Phillip White was not guilty of contributory negligence;

(2) in giving plaintiff judgment in view of the fact that there is no proof of any negligence of any employee of the United States or that plaintiff failed to connect any employee of the United States with the alleged negligence;

(3) in finding that the clearing of the alleged dud area was not a discretionary act and hence within the exceptions of the Federal Tort Claims Act;

(4) in failing to find that the plaintiff assumed the risk of his undertaking;

(5) in failing to find that the United States was not under any obligation to keep the premises in a safe condition for licensees;

(6) in finding that the United States was negligent although there is no allegation of negli-

gence as to any particular employee of the United States in the complaint or proven by the evidence;

(7) in failing to find that defendant had no duty to warn plaintiff of danger likely to be encountered by him; that defendant did warn plaintiff of possible danger;

(8) in failing to find that the defendant was not obligated to make a careful or any inspection of the premises in order to locate any danger which the plaintiff might encounter;

(9) in failing to find that plaintiff's own employee was the direct or proximate cause of the damages or that the same was in the nature of an intervening cause;

(10) in failing to find that plaintiff's own employee, a soldier, was the agent of plaintiff and that said soldier was not acting within the scope of his employment;

(11) in failing to find that the United States had no actual knowledge of any duds;

(12) in finding that the Industrial Indemnity Company of San Francisco was entitled to $3,722.11 or any sum whatsoever in this action.

CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ RUDOLPH J. SCHOLZ,
Assistant United States Attorney, Attorneys for Appellant.

Affidavit of Service by Mail attached.
[Endorsed]: Filed January 21, 1952.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

The appellant, United States of America, by its attorney herein, hereby designates for inclusion in the transcript of record upon appeal, the complete record and all the proceedings and evidence in the action.

Dated January 21, 1952.

CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ RUDOLPH J. SCHOLZ,
Assistant United States Attorney.

[Endorsed]: Filed January 21, 1952.